LASC Case No. SC080477
Court of Appeal Case No. B184638
California Supreme Court Case No. S146114

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

JOHNNY SHIN

Plaintiff and Respondent

vs.

JACK AHN

Defendant and Appellant

AFTER A DECISION BY THE COURT OF APPEAL
SECOND DISTRICT, DIVISION TWO

ANSWER TO AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, FARMERS INSURANCE EXCHANGE, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA

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I. INTRODUCTION

In an effort to obtain by judicial legislation that which they never could obtain in the State Legislature, the insurance industry amici, urge this Court to ignore well established principles of tort law and expand the fictional concept of primary assumption of risk beyond reason. In the State Legislature, the policies, arguments, and counter arguments concerning this extension of tort law immunity could be heard and debated in public, voted on, and signed or not signed by the Governor. Here, the insurance industry amici seek to have Courts throughout the State make individual determinations concerning what is inherent in a particular game, not on the basis of facts, not on the basis of expert testimony, not subject to cross-examination, and not subject to a jury trial.

The insurance industry amici would apply the same rules applicable to football and skiing, regardless of the conduct, to gentler games, such as golf, in instances where imposing liability would have no effect on the competitive or recreational goals of the game. See, Consumer Attorneys of California Amicus Brief. While no doubt a jury could find that the conduct of Ahn was reckless, See Restatement of Torts 2d. 500 (d), the insurance industry amici urge that the Court make the determination by a preemptive duty analysis, utilizing the now hackneyed and amorphous term, "primary assumption of the risk," which in the present era, in light of comparative negligence principles, appears to have lost its usefulness.

Because there is such inconsistency in the understanding and application of the primary assumption of risk doctrine, different trial and appellate judges have reached

different conclusions based on their own idiosyncracies. For each case and for each game, the case could well wind up in the California Supreme Court, where there has been no consistent theory; and as the judicial majority changes so has the concept of assumption of the risk. Justice Frankfurter exposed the concept of assumption risk in general as an example of how the uncritical use of words bedevils the law. It does. It has and it will continue to do so. In a search for judicial efficiency, the doctrine of primary assumption of risk has compounded litigation both in the trial and appellate courts, and the use of common law tort principles as many Courts have done throughout the United States would not preclude summary judgments where the facts are not in dispute, but would not continence a violation of separation of powers concepts, the denial of due process, or the right to trial by jury. In states where primary assumption of risks does not exist, persons have not stopped playing golf.

The only release of an injured plaintiff from the strictures of the imprisoning doctrine of primary assumption, posited by the insurance industry amici, is the possibility that the injured person could present the issue of whether the conduct was "reckless," or "willful." There, for the insurance companies, all would not be lost since, by those limits, insurance companies could get off the hook and their policyholders, such as Ahn, would have to pay the bill, because the insurance companies would not have to indemnify, and the loss shifting aspects of traditional duty analysis could be ignored.

II. LEGAL ARGUMENT

A. THE PRIMARY ASSUMPTION OF RISK DOCTRINE DOES NOT APPLY WHERE, AS HERE, THE DEFENDANT VIOLATED THE VERY FUNDAMENTAL RULES OF SAFETY IN GOLF THROUGH A CONDUCT THAT IS NOT INHERENT IN THE GAME OF GOLF.

Amici Curiae, Association of California Insurance Companies, Farmers Insurance Exchange, National Association of Mutual Insurance Companies, and Personal Insurance Federation of California (hereinafter referred to as "insurance industry amici") open their argument by stating that primary assumption of the risk bars recovery for injuries resulting from the negligent conduct of a coparticipant in a sporting activity that does not increase the risks inherent in the sport. (Amici Brief, pg. 8)

Insurance industry amici in large part rely on the three out-of-seven Justices' reasoning in *Knight v. Jewett,* 3 Cal. 4th 296 (1992), for their *wooden* invocation of the so-called doctrine of "primary assumption of the risk," and its distinction from "secondary assumption of the risk." The majority of the Court of Appeal below, in one way or another, rejected the use of these concepts in this case. Accordingly, Shin herein asserts that the primary-secondary assumption of risk vernacular should be rejected and ordinary comparative negligence and assumption of risk defense principles should be applied in their place. Even if they are not, however, and the primary assumption risk analysis is left intact, the present is not a primary assumption of risk case, and secondary assumption evaluated under comparative negligence standards should be applied.

Justice Mosk, joined in by Justice Panelli, stated his disagreement with the concept

of assumption of the risk in its entirety and opined he "would eliminate the confusion that continued reliance on implied assumption of risk appears to cause, and would simply apply comparative fault principles to determine liability," reasoning as follows:

> "But I would go farther than does the lead opinion. Though the opinion's interpretation of *Li v. Yellow Cab Co.* (supra, 13 Cal.3d 804) is reasonable, I believe the time has come to eliminate implied assumption of risk entirely. The all-or- nothing aspect of assumption of risk is as anachronistic as the all-or-nothing aspect of contributory negligence. As commentators have pointed out, the elements of assumption of risk "are accounted for already in the negligence prima facie case and existing comparative fault defense." (Wildman & Barker, *Time to Abolish Implied Assumption of a Reasonable Risk in California* (1991) 25 U.S.F. L.Rev. 647, 679.) Plaintiffs' behavior can be analyzed under comparative fault principles; no separate defense is needed. (See) Wildman and Barker explain cogently that numerous California cases invoke both a duty analysis--which I prefer--and an unnecessary implied assumption of risk analysis in deciding a defendant's liability. (See at p. 657 & fn. 58.) In the case before us, too, the invocation of assumption of risk is superfluous: far better to limit the analysis to concluding that a participant owes no duty to avoid conduct of the type ordinarily involved in the sport.
>
> Were we to eliminate the doctrine of assumption of risk, we would put an end to the doctrinal confusion that now surrounds apportionment of fault in such cases. Assumption of risk now stands for so many different legal concepts that its utility has diminished. A great deal of the confusion surrounding the concept "stems from the fact that the term 'assumption of risk' has several different meanings and is often applied without recognizing these different meanings." (*Rini v. Oaklawn Jockey Club* (8th Cir. 1988) 861 F.2d 502, 504-505.) Courts vainly attempt to analyze conduct in such esoteric terms as primary assumption of risk, secondary assumption of risk, reasonable implied assumption of risk, unreasonable implied assumption of risk, etc. Since courts have difficulty in assessing facts under the rubric of such abstruse distinctions, it is unlikely that juries can comprehend such distinctions.
>
> Justice Frankfurter explained in a slightly different context, "The phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas."

(*Tiller v. Atlantic Coast Line R. Co.* (1943) 318 U.S. 54, 68 [87 L.Ed. 610, 618, 63 S.Ct. 444, 143 A.L.R. 967] (conc. opn. of Frankfurter, J.).) Thus the Rini court, in attempting to determine the viability of assumption of risk in light of the Arkansas comparative fault law, was forced to identify "four types of assumption of risk ...." (Rini v. Oaklawn Jockey Club, supra, 861 F.2d at p. 505.) These included "implied secondary reasonable assumption of risk" and "implied secondary unreasonable assumption of risk." (at p. 506.)

Knight v. Jewett, 3 Cal. 4th 296, 321-322 (Cal. 1992).

The game involved here is the game of "golf." Many courts and various jurisdictions have dealt with "golf" as being the game of "gentle" persons (as described by Amicus CJAC). These courts have soundly made a distinction between "contact" and "non-contact" sports, with only the former requiring the plaintiff to prove a violation of the elevated standard of care. *Novak v. Virene,* 224 Ill. App. 3d 317 (1991). Golf is simply not the type in which participants are inherently, inevitably or customarily struck by the ball. Unlike the contact sports, there is never a need for players to touch one another. Rather, golf is a sport which is contemplative and careful, with emphasis placed on control and finesse, rather than speed or raw strength. Although the game of golf certainly presents significant dangers, these danger are more psychological than physical. Moreover, the physical dangers that exist are diminished by long-standing traditions in which courtesy between the players prevails. In such an environment, players have the time to consider the consequences of their actions and to guard against injury to those who may be in harms way. *Dilger,* 289 Ill. App. 2d at 221. "A golf course is not usually considered a dangerous place, nor the playing of golf a hazardous undertaking. It is a matter of common knowledge that players are expected not to drive their balls without

giving warning when within hitting distance of persons in the field of play, and that countless persons traverse golf courses the world over in reliance on that very general expectation." *Everett v. Goodwin*, 201 N.C. 734, 161 S.E. 316, 318 (1931); *quoting*, *Schlenger v. Weinberg*, 107 N.J.L. 130, 150 A. 434, 435, 69 A.L.R. 741.

Cheong v. Antablin, 16 Cal. 4th 1063, 1068 (1997), the primary case relied upon by insurance industry amici (Amici Brief, pg. 4), involved the sport of "skiing." The *Cheong* Court stated at pg. 1068:

> "[In *Knight*] we noted that "As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. (See Civ. Code, §1714)" (*Knight, supra,* 3 Cal. 4th at p. 315. This general rule, however, does not apply to coparticipants in a sport, where "conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself .... In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant. [P] Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, ... defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport .... [P] In some situations, however, the careless conduct of others is treated as an 'inherent risk' of a sport, thus barring recovery by the plaintiff." (*Id.* at pp. 315-316.) Courts should not "hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport" because "in the heat of an active sporting event . . ., a participant's normal energetic conduct often includes accidentally careless behavior.... [V]igorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct." (*Id.* at p. 318.)"

As such, by its own language, the *Cheong* case eliminates the application of the doctrine of primary assumption of the risk from cases such as the present one, where risk is **not** inherent in the "nature" of the sport itself. "Golf" does **not** necessarily involved a "heated" "active" event, such as "skiing," playing "football" or "hockey" or any other

heated game where the clock is ticking and the players cannot stop. The game involved here is "golf." Various courts throughout our nation have soundly made a distinction between "contact" and "non-contact" sports, with only the former requiring the plaintiff to prove a violation of the elevated standard of care. *Novak v. Virene,* 224 Ill. App. 3d 317 (1991). Golf is simply not the type in which participants are inherently, inevitably or customarily struck by the ball. Unlike the contact sports, there is never a need for players to touch one another. Rather, golf is a sport which is contemplative and careful, with emphasis placed on control and finesse, rather than speed or raw strength. Unlike other games, golf is not a game where players race against time or where time is of the essence. Although the game of golf certainly presents significant dangers, these dangers are more psychological than physical. Moreover, the physical dangers that exist are diminished by long-standing traditions in which courtesy between the players prevails. In such an environment, players have the time to consider the consequences of their actions and to guard against injury to those who may be in harms way. *Dilger,* 289 Ill. App. 2d at 221. "A golf course is not usually considered a dangerous place, nor the playing of golf a hazardous undertaking. It is a matter of common knowledge that players are expected not to drive their balls without giving warning when within hitting distance of persons in the field of play, and that countless persons traverse golf courses the world over in reliance on that very general expectation." *Everett v. Goodwin*, 201 N.C. 734, 161 S.E. 316, 318 (1931); *quoting, Schlenger v. Weinberg*, 107 N.J.L. 130, 150 A. 434, 435, 69 A.L.R. 741.

Insurance Companies' argument seeks to plant a forest as to what golf is so as to

hide the facts concerning what is at issue here. Certainly, balls may go in a direction not intended, and that broadly may be a risk that players may assume. But here, viewing the facts most favorably to Respondent, as the law requires on summary judgment, Ahn had knowledge of Shin's location, had knowledge of the rules of golf, was not in a hurry, had been hitting the ball on multiple occasions where Shin was located, did not warn Shin that he was about to hit the ball, and he did so. This was not a risk, which Shin assumed.

B. AHN'S CONDUCT VIOLATES THE VERY FUNDAMENTAL RULES OF THE GAME AND WAS TOTALLYOUTSIDE THE RANGE OF THE ORDINARY ACTIVITY INVOLVED IN THE SPORT OF GOLF.

Mistakenly relying on *Cheong, supra.,* insurance industry amici apply an "intent" and "recklessness" standard to the conduct involved here. *Cheong* did not impose such a standard on a "golf" game. Au contraire. *Cheong* approved of the general rule that persons have a duty to use due care to avoid injury to others and to hold them liable if hteir careless conduct injuries another person, citing *Civil Code* §1714 and *Knight, supra,* 3 Cal. 4th at p. 315. It expressly imposed liability upon those who breach their "duty to use due care not to increase the risks to a participatnt over and above those inherent in the sport." *Cheong, supra.,* at 16 Cal. 4th 1068. As demonstarted hereinabove, Ahn's conduct did not fall within the risks inherent in the sport of game.

On August 10, 2003, Shin was playing golf with Ahn in the same group at Rancho Park Golf Course, in Los Angeles, California. (AA 107:6-7) In the vicinity of the 13th hole, and *prior to* anyone in the party teeing off of the 13th hole, Shin made eye contact with Ahn as Ahn saw Shin standing in front of Ahn in close proximity to his left. (AA

107:7-9) At this time, Shin took a break to look at his cell phone to see if there were missed calls, to get water out of his golf bag and *to get his golf club* to tee off at the 13th hole. (AA 107:10-12) While Shin was standing in front of Ahn, with his back facing Ahn, in close proximity to Ahn, all of a sudden and without any warning, Shin was struck in the head with a golf ball that was hit by Ahn. (AA 107:13-15) Shin did not anticipate Ahn would strike the golf ball while Shin was in close proximity in front of Ahn, to Ahn's left, in plain view of Ahn, at the 13th hole. (AA 107:16-18) Ahn gave no warning before he hit the ball at the 13th hole. (AA 107:18-19)

Ahn does not deny that he never issued the customary "fore" warning, as is the usual custom and practice for the game of golf under these circumstances. Shin was in Ahn's zone of danger. When Ahn did tee off, he pulled his golf ball to the left as he had been doing the entire day, striking Shin in his temple only 25 to 30 feet from where Ahn teed off, landing Shin in the UCLA hospital with serious, life threatening injuries, in a paralyzed state. (AA 76) Ahn knew that his shots were veering left all day, thus the landing area would in all probability be in his left, where Shin was in fact standing.[1] (AA 78:16-22)

The testimony of Jeffrey Frost, the third player in Ahn and Shin's threesome golf game, confirmed that the rate of travel of Ahn's golf ball that struck Shin on that day was

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[1] The third player in the parties' golf game, Frost, testified at his deposition as follows: "... however, that day he [ahn] had pulled at least a half a dozen tee shots, sometimes hitting things to the left. And I even made a comment earlier that date that *I wouldn't want to be standing on the side today*.... But I made it to him, not Johnny, and I wish I had." (Emphasis.) Frost Depo. Transcript, p. 29:10-16. (AA 78:16-22)

in excess of 120 miles per hour. (AA 76:14-15 and footnote 7) Mr. Frost also testified that on the day in question Ahn knew that his shots were veering left all day (the location where Shin was at the time of the incident), thus the landing area would in all probability be to Ahn's left, where Shin was standing. (AA 78:17:22)

Ahn admitted that he knew the rules of golf before he took his swing and that he was aware of the United States Golf Association's pocketbook on the Rules of Golf. He admitted that he read that a "player should not play until the players in front are out of range." (AA 100:27:101:6) When asked why he failed to wait until he knew where Shin was before teeing off on the 13th hole, Ahn answered: "No particular reason." When asked why he didn't wait for Shin to get to the 13th hole before teeing off, Ahn answered: "No particular reason." When asked if he was in a particular rush to finish the 13th hole, he answered: "No." (AA 100:21-26)

Ahn failed to exercise reasonable care towards his companion, Shin, with whom he was playing golf as part of a threesome at the time of the incident. Ahn has breached his duty of care. Shin did not assume the risk involved here.

In *Shin v. Ahn,* 141 Cal. App. 4th 726, 740-742 (2006), the Court did not apply a shotgun analysis treating all golf ball accidents the same, as Insurance Companies suggest. The question before the Court was not the broad question of whether getting hit by a golf ball is an inherent risk of the game of golf. At issue here is the more precise question of whether: *a golfer who tees off, without ascertaining the location of the individuals in his own group, increases such a risk beyond that inherent in the sport.* The

trial court and the Court of Appeal answered that question in the affirmative, holding that such conduct was not a risk inherent in the game of golf.

C. DUTY OF DUE CARE WAS BREACHED BY AHN WHEN HE HIT A BALL IN THE DIRECTION OF RESPONDENT AND FAILED TO WARN HIM.

Insurance industry amici (Amici Brief, pg. 15) claim that Ahn's failure to warn or to ascertain the location of his co-participants prior to teeing off is not and should not be considered reckless. The Court of Appeal disagreed, when it made the finding that Ahn owed Shin a duty of care, and that he breached that duty. Examination of the Court of Appeal's opinion reveals that the determination by the Court of Appeal was based on evidence which not only was undisputed, but was also based on judicial admissions by Petitioner. The issue of duty was an intimate part of the motion for summary judgment by Petitioner. He should not now complain that the trial court and the Court of Appeal resolved that issue against him.

In this regard, the Court of Appeal with due care resolved this issue as follows:

> "In view of the record before us, however, we need not resolve this conflict. The trial court determined that appellant owed a duty of care to ascertain Shin's whereabouts before teeing off, and the evidence was undisputed that he did not do so. On the basis of this evidence, we conclude, as a matter of law, that appellant breached his duty of care. (See, e.g., *Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206, 1212 [11 Cal. Rptr. 3d 169] [where the facts are undisputed, the appellate court can resolve the question as a matter of law in accordance with the general principles governing summary judgment].)" *Shin v. Ahn*, 141 Cal. App. 4th 726, 743 (Cal. Ct. App. 2006).

The decision of the Court of Appeal on the issue of duty is based on undisputed facts, and judicial admissions by Petitioner. The trial court did not grant a cross-summary

judgment or adjudication on this issue. The appellate court here establishes that such a duty does exist, and how that duty is finally resolved should be subject to further proceedings in the trial court.[2]

D. THE CASES RELIED ON BY SHIN AND BY THE COURT OF APPEAL BELOW ARE CONSISTENT WITH TORT THEORY AND DUTY ANALYSIS POLICY.

1. The Golf Cases Focusing On Whether The Plaintiff Was In The "Zone Of Danger" Soundly Applied Standard Negligence Principles, Rather The Erroneous Proposed Primary Assumption Of The Risk Doctrine.

The trial and the appellate courts spoke in this case. They both examined, analyzed and applied cases from various jurisdictions many of which applied standard negligence principles to this case. Others have apparently continued to stumble in the foray of reconciling the doctrine of primary assumption of risk with reason. (For sake of brevity, these cases will not be reargued here; they have been cited and properly analyzed in Shin's brief in the appellate court and in his answer on the merits in this Court.)

Nonetheless, what really matters is the law of **this State.** Justices Mosk, Kennard and George saw the applicability of a factual analysis of reckless behavior in Restatement 2d of Torts section 500, comm. d:

"If the actor's conduct is such as to involve a high degree of risk that serious harm

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[2] Federal Courts have granted summary judgment against the moving party in similar instances. If there are no factual issues and the opposing party is entitled to judgment as a matter of law, and the moving party had notice and an adequate opportunity to address the issues, summary judgment may be granted against the moving party forthwith. *Cool Fuel, Inc v. Connett* 685 F.2d. 309, 311 (9th Cir. 1982). This issue need not be decided in this matter since no summary judgment or summary adjudication was granted to the non-moving party. This issue is one which could well be resolved in the trial court.

will result from it to anyone who is within range of its effect, the fact that he knows or has reason to know that others are within such range is conclusive of the recklessness of his conduct toward them. It is not, however, necessary that the actor know that here is anyone within the area made dangerous by his conduct. It is enough that he knows that there is strong probability that others may rightfully come within such zone. (Rest. 2d Torts, supra, §500, com. d, p. 589)." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1014-1015 (1993), dissent by Justices Mosk, Kennard and George.

The Court of Appeal agreed in *Shin v. Ahn*, 141 Cal. App. 4th 726, at pgs. 741-742:

"n3 We are somewhat troubled by the same concerns raised by the court in *Staten v. Superior Court*, supra, 45 Cal.App.4th 1628. There, the court characterized the prohibition of considering expert testimony in determining the legal question of duty as "cramm[ing] a square peg of fact into the round hole of legal duty: whether there is or is not a duty in a primary assumption of risk case turns on the question whether a given injury is within the 'inherent' risk of the sport, which in turn can only be determined on a set of factual conceptions of the particular sport and how it is played." (Id. at p. 1635.) We agree with the Staten court's suggestion that courts be permitted to receive expert evidence on the factual nature of the sport, though not on the ultimate legal questions of inherent risk and duty. (Id. at p. 1637.) For this reason, it would have been proper for the trial court to consider the expert declarations only to the extent they described factual principles related to the game, but not to the extent that they contained opinions as to whether there was a breach of duty."

2. <u>The *Yancey* Decision Is Closely Similar To The Facts Of This Case And Its Law Should Apply To Golf Cases Such As Here.</u>

"In *Yancey*, the plaintiff suffered injuries after being hit by a discus in a college physical education class; she had gone onto the field to retrieve her discus and the defendant, who was throwing next, failed to observe the field before his throw. (*Yancey*, supra, 28 Cal.App.4th at p. 561.) Reversing summary judgment in favor of the defendant, the appellate court held that the doctrine of primary assumption of risk was inapplicable because the defendant "owed a duty of care to Yancey to ascertain that the target area was clear before he commenced his throw." (Id. at p. 566.) In reaching this conclusion, the court found ***that application of the primary assumption of risk doctrine to a sport generally requires that two questions be answered affirmatively: "First, is the careless conduct of participants an***

inherent risk of the sport? Second, will imposition of a legal duty, with potential liability, alter the nature of the sport or chill participation in it?" (Id. at p. 565.)

In answering the first question negatively, the court drew a distinction relevant here, explaining that while "[t]he discus, by its nature, involves launching a dangerous projectile. ... [T]he issue posed by the facts alleged in the petitioner's complaint is much more specific--i.e., is the careless conduct of a participant in throwing the discus without first ascertaining the target area is clear an inherent risk of the sport?" (*Yancey,* supra, 28 Cal.App.4th at p. 565.) The court concluded that "[n]othing about the inherent nature of the sport requires that one participant who has completed a throw and is retrieving his or her discus should expect the next participant to throw without looking toward the landing area." (Id. at p. 566, fn. omitted.) Significantly, the court analogized discus throwing to golf, explaining: "Discus bears some similarity to golf. Neither sport has, as one of its objectives, the endangering of coparticipants. Anyone playing golf is subjected to a risk of being hit by a ball struck by another golfer on the course. Still, it is common knowledge that golfers check their intended target area and make sure it is clear before hitting a shot. ... Nothing in the facts alleged in Yancey's complaint support a legal conclusion that similar commonsense precautions are inappropriate in a physical education discus class." (Ibid.) Also answering the second question negatively, the Yancey court reasoned that "[r]equiring discus participants to check the target area before launching a throw will not alter or destroy the inherent nature of the activity itself" and would, at most, "cause a slight delay before the thrower begins." (Ibid.)

Illustrating application of the hypothetical golf situation posed in *Yancey*, the court in Allen, supra, 292 So. 2d at page 787, reversed the dismissal of an action brought by a golfer against a member of his foursome which alleged that the defendant was negligent when he hit a shot on the fairway, knowing that the plaintiff was in the ball's intended line of flight and was unaware that the defendant was about to strike the ball. The court found that the principle that a golfer assumes the risk of being hit by an errant ball was inapplicable and "that plaintiff had the right to assume a member of his own party would not drive while plaintiff was standing in full view near the intended line of flight with plaintiff's back turned toward the impending play. This was a risk plaintiff did not assume." (Id. at p. 790; accord, *Schick v. Ferolito* (2000) 327 N.J. Super. 530 [744 A.2d 219, 221] [rule that "a golfer hitting a ball has a duty to use reasonable care before executing a swing, to first observe whether there is anybody else in the line of fire, and if so, to provide an adequate warning" applied to golfer who hit an unannounced and unexpected mulligan after all other members of the foursome had teed off, as such a shot was not an inherent part of the game].)"

Insurance industry amici attempt to distinguish *Yancey* by claiming Shin was not in the landing area. But, he was.[3] And, Ahn knew that his shots were veering left all day, thus the landing area would in all probability be in his left, where Shin was in fact standing.[4] (AA 78:16-22)

In *American Golf Corp. v. Sup. Ct.,* 79 Cal. App. 4th 30, 37 (2000), cited by CJAC at pg. 8, the Court stated:

> "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is w ell established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." (Id. at pp. 315-316.) "In some situations, however, the careless conduct of others is treated as an 'inherent risk' of a sport, thus barring recovery by the plaintiff." (Id. at p. 316.)
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> "[R]esolution of the question of the defendant's liability in such cases turns on whether the defendant had a legal duty to avoid such conduct or to protect the plaintiff against a particular risk of harm. As already noted, the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself. Additionally, the scope of the legal duty owed by a defendant frequently

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[3] In the vicinity of the 13th hole, and *prior to* anyone in the party teeing off of the 13th hole, Shin made eye contact with Ahn as Ahn saw Shin standing in front of Ahn in close proximity to his left. (AA 107:7-9) At this time, Shin took a break to look at his cell phone to see if there were missed calls, to get water out of his golf bag and *to get his golf club* to tee off at the 13th hole. (AA 107:10-12) While Shin was standing in front of Ahn, with his back facing Ahn, in close proximity to Ahn, all of a sudden and without any warning, Shin was struck in the head with a golf ball that was hit by Ahn. (AA 107:13-15) Shin did not anticipate Ahn would strike the golf ball while Shin was in close proximity in front of Ahn, to Ahn's left, in plain of Ahn, at the 13th hole. (AA 107:16-18) Ahn gave no warning before he hit the ball at the 13th hole. (AA 107:18-19)

[4] The third player in the parties' golf game, Frost testified at his deposition as follows: "... however, that day he [ahn] had pulled at lest a half a dozen tee shots, sometimes hitting things to the left. And I even made a comment earlier that date that *I wouldn't want to be standing on the side today....* But I made it to him, not Johnny, and I wish I had." (Emphasis.) Frost Depo. Transcript, p. 29:10-16. (AA 78:16-22)

will also depend on the defendant's role in, or relationship to, the sport." (Id. at pp. 316-317.)

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It is for the court to decide whether an activity is an active sport, the inherent risks of that sport, and whether the defendant has increased the risks of the activity beyond the risks inherent in the sport. (Id. at p. 1634.) Although an expert may not determine matters that are within the province of the court to decide, expert opinion may inform the court on these questions. (Cf. id. at pp. 1635-1637; see e.g., Mosca v. Lichtenwalter (1997) 58 Cal. App. 4th 551, 552-553 [68 Cal. Rptr. 2d 58].)"

The Supreme Court, in *Kahn v. East Side Union High School Dist.*, 31 Cal. 4th 990 (2003), examined the record and determined that there were material issues of fact concerning whether the conduct involved there was reckless. It thereupon reversed the summary judgment.

The range of analysis regarding golf accidents only serves to echo the multiple pronouncements concerning the application of the theory of primary assumption of the risk, it clearly does not abolish the requirement in summary judgment motions that the facts upon which a summary judgment is based be uncontroverted ones. Plaintiff is entitled to the benefit of all reasonable inferences which may be drawn from the evidence. Where two inferences may be drawn, one supporting the motion and the other opposing it, the Court must adopt the later. Doubts must be resolved against granting the motion. *Aguilar v. Atlantic Richfield Corp.*, 78 Cal. App. 4th 79, 115 (2000).

Even if Ahn adequately pled the defense of assumption of risk, which he did not here, assumption of risk is not applicable to the facts of this case. Shin did not assume the risk of being hit in the head by a ball struck by Ahn, while Shin was standing with his

back turned on the 13th tee. To conclude otherwise is at odds with case law. Although being struck in the head with a gold ball hit by a member of another group can be an inherent risk in golf (*American Golf Corp. v. Sup.Ct.*, 79 Cal. App. 4th 30, 38 (2000)), when a player (such as Shin) is struck by a playing companion (such as Ahn), is unaware that the companion is about to play, is in the zone of danger, and is not warned by his playing companion, the risk is not the same and, thus, is not an inherent risk to be assumed. A member of the same group does not assume the risk that his playing companion will tee off a golf ball without first looking to see if the area in front is clear. Shin was in clear view of Ahn and in close proximity of Ahn. Ahn, however, states that he did not look in Shin's direction prior to teeing off. This is not an excuse; it is not a defense. See, Restatement of Torts 2d, section 500(d).

E. <u>THE IMPOSITION OF A DUTY IN SITUATIONS SUCH AS HERE WILL NOT ALTER THE NATURE OF OR CHILL PARTICIPATION IN THE SPORT OF "GOLF." INSTEAD, IT WOULD SANITIZE THE GAME AND REGULATE AT NO ADDITIONAL BURDEN OR EXPENSE ITS SAFETY.</u>

> "In evaluating the trial court's determination of duty here, we are guided by the two questions posed in Yancey--whether the careless conduct at issue is an inherent part of the sport and whether the imposition of a duty will alter the nature of or chill participation in the sport. (Yancey, supra, 28 Cal.App.4th at p. 565.) While certainly we agree with the court in American Golf that there is always an inherent risk that a golf ball will take an unintended direction (see American Golf, supra, 79 Cal.App.4th at pp. 37-38), the issue here was whether Shin assumed the risk of a member of his own threesome teeing off without first checking to see where he was standing. (See *Yancey*, supra, at pp. 565-566.) Indeed, these circumstances are not akin to a golfer unintentionally hitting a ball into a neighboring fairway, but rather, are similar to a golfer hitting a ball onto a fairway when the preceding foursome is well within range of the shot and without ascertaining whether the foursome is aware of the impending shot. We cannot find that Shin assumed the risk of appellant's teeing off without first ascertaining his

whereabouts. According to the evidence on summary judgment, one of the first rules of golf promulgated by the United States Golf Association is that before playing a stroke or making a practice swing, "the player should ensure that no one is standing close by or in a position to be hit by ... the ball ... ." The undisputed evidence further showed that appellant did not comply with this rule. As such, appellant's conduct was not an inherent part of the sport and involved an increase in golf's inherent risks. n3 (See *Huff v. Wilkins*, supra, 138 Cal.App.4th at p. 743 [reversing summary judgment in favor of a minor who unlawfully drove an all-terrain vehicle (ATV) and collided with the plaintiff, because "[a]lthough a collision between ATV's was an inherent risk of the sport of off-roading, [defendant's] failure to comply with the safety regulations was not an inherent risk, for reasons discussed, and to any extent the failure increased the risk of a collision, [plaintiff] did not assume the increased risk merely by participating in the sport"].)

In *Yancey v. Sup. Ct.,* 18 Cal. App. 4th 558, 556 (1994), the Court held that nothing inherent in the nature of the sport requires that one participant who has completed a throw and is retrieving his or her discus should expect the participant to throw without looking toward the landing area.

1. <u>Because Ahn's Careless Conduct Here Is Not Inherent In The Sport Of Golf. Due Care Alter The Nature Of The Sport Or Chill Participation.</u>

Because Ahn's careless conduct here is not inherent in the sport of golf, due care does not alter the nature of the sport or chill participation. The Court of Appeal below eloquently stated Ahn's conduct here was not an inherent part of the golf sport:

> "In evaluating the trial court's determination of duty here, we are guided by the two questions posed in Yancey--whether the careless conduct at issue is an inherent part of the sport and whether the imposition of a duty will alter the nature of or chill participation in the sport. (Yancey, supra, 28 Cal.App.4th at p. 565.) While certainly we agree with the court in American Golf that there is always an inherent risk that a golf ball will take an unintended direction (see American Golf, supra, 79 Cal.App.4th at pp. 37-38), the issue here was whether Shin assumed the risk of a member of his own threesome teeing off without first checking to see where he was standing. (See *Yancey*, supra, at pp. 565-566.) Indeed, these circumstances are not akin to a golfer unintentionally hitting a ball into a

neighboring fairway, but rather, are similar to a golfer hitting a ball onto a fairway when the preceding foursome is well within range of the shot and without ascertaining whether the foursome is aware of the impending shot. We cannot find that Shin assumed the risk of appellant's teeing off without first ascertaining his whereabouts. According to the evidence on summary judgment, one of the first rules of golf promulgated by the United States Golf Association is that before playing a stroke or making a practice swing, "the player should ensure that no one is standing close by or in a position to be hit by ... the ball ... ." The undisputed evidence further showed that appellant did not comply with this rule. As such, appellant's conduct was not an inherent part of the sport and involved an increase in golf's inherent risks. n3 (See *Huff v. Wilkins*, supra, 138 Cal.App.4th at p. 743 [reversing summary judgment in favor of a minor who unlawfully drove an all-terrain vehicle (ATV) and collided with the plaintiff, because "[a]lthough a collision between ATV's was an inherent risk of the sport of off-roading, [defendant's] failure to comply with the safety regulations was not an inherent risk, for reasons discussed, and to any extent the failure increased the risk of a collision, [plaintiff] did not assume the increased risk merely by participating in the sport"].)

III. CONCLUSION

Insurance industry amici's effort to obtain by judicial legislation that which they never could obtain in the State Legislature should be rejected. In the State Legislature, the policies, arguments, and counter arguments concerning this extension of tort law immunity could be heard and debated in public, voted on, and signed or not signed by the Governor. Insurance industry amici's urging here would bypass constitutional mandates. The decision of the trial court and of the California Court of Appeal should be affirmed.

Dated: May 8, 2007

Respectfully submitted,

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LAW CORPORATION, PC

By: _____
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Johnny Shin

CERTIFICATE OF WORD COUNT
Cal. Rules of Court, Rule 14c(1)

The text of this brief consists of 6806 words as counted by the WordPerfect word-processing program used to generated the brief, utilizing a 13.0 print font.

Dated: May 8, 2007

RICHARD L. KNICKERBOCKER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident and or employed in the City of Santa Monica, County of Los Angeles. I am over the age of eighteen and not a party to this action. My business address is 233 Wilshire Boulevard, Suite 400, Santa Monica, California 90401.

On this date, I served a true and correct copy of the document entitled **ANSWER TO AMICUS CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, FARMERS INSURANCE EXCHANGE, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA**, on the interested parties in this action, by depositing the same in an enclosed envelope, with First Class Mail postage fully prepaid, in the U.S. mailbox, addressed as follows:

Clerk of the Court of Appeal
Division Two
300 South Spring Street, Second Floor
Los Angeles, CA 90013
[Appellate Court]

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c/o Clerk of the Los Angeles Superior Court
1725 Main Street
Santa Monica, CA 90401
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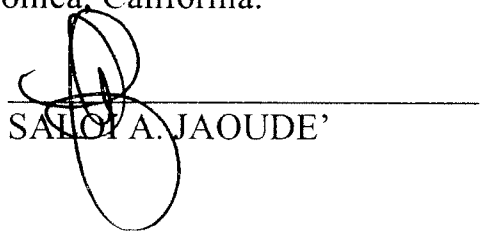
I declare under penalty of perjury under the Laws of the State of California and of the United States of America that the foregoing is true and correct.

Executed on this 8th day of May, 2007, at Santa Monica, California.



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